

PHYLLIS BROWN)	
Claimant)	
VS.)	
)	Docket No. 223,178
ELEC-TRON, INC.)	
Respondent)	
AND)	
)	
UNITED STATES FIRE INSURANCE COMPANY)	
Insurance Carrier)	

Claimant asks for review of an Award by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument February 23, 2000.

Gary A. Winfrey of Wichita, Kansas, appeared on behalf of claimant. Douglas C. Hobbs of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

Respondent contends claimant has failed to prove she suffered any impairment for a mental condition traceable to her physical injury. Respondent also contends the expenses for treatment by Dr. Pedro A. Murati should be treated as unauthorized because respondent was not permitted to provide a list of three physicians in accordance with K.S.A. 44-510(c)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. Claimant is awarded benefits for a 20 percent permanent partial disability based on a combination of physical and psychological impairment.

Findings of Fact

1. On January 23, 1996, claimant injured her back, hip, legs, and ribs when she slipped on ice and fell to the ground at work.

2. Respondent provided authorized medical treatment first with Dr. Lygrisse, then with a chiropractor, Dr. Lunsford, and finally with Dr. Robert L. Eyster. Dr. Eyster released claimant from his care in January 1997. At that time, Dr. Eyster diagnosed lumbar strain. He recommended no lifting over 30 pounds and no repetitive or excessive bending. The restrictions were for an indefinite period, but Dr. Eyster expected to lessen the restrictions as symptoms improved.

3. The ALJ appointed Dr. Philip R. Mills to perform an independent medical examination. Dr. Mills first saw claimant July 14, 1997, and diagnosed chronic sprain and myofascial pain syndrome. Dr. Mills recommended additional treatment and, over respondent's objection, the ALJ ordered respondent to provide treatment with Dr. Mills. Dr. Mills released claimant September 18, 1997, with a rating of 5 percent impairment of function to the body as a whole. He did not include the myofascial pain syndrome in the rating because he did not know the cause of it. Dr. Mills based his rating on the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. Dr. Mills acknowledged claimant has a bulging disc but he did not believe the bulging disc was the cause of any of the symptoms. Dr. Mills also concluded the pain drawings were consistent with symptom magnification and the range of motion tests were inconsistent. He did not believe claimant had radiculopathy.

As of the September 18, 1997 visit, Dr. Mills stated the restrictions would be to avoid sitting for longer than 30 minutes at a time without changing positions. At this time, Dr. Mills concluded claimant had reached maximum medical improvement, and he provided a rating of the permanent impairment. Claimant returned October 6, 1997. After this visit, he advised claimant she should use good body mechanics, avoid lifting bulky objects unless with another person, and avoid trunk swivel-type maneuvers. He also advised she should return on an as-needed basis.

4. After the October 6, 1997 visit with Dr. Mills, claimant's attorney referred claimant to Dr. Murati. Dr. Murati first saw claimant October 23, 1997. Dr. Murati did not believe claimant had reached maximum medical improvement and recommended additional testing and treatment. When respondent refused to authorize that treatment, claimant filed for a

preliminary hearing. After hearing the evidence, the ALJ ordered respondent to provide the testing and treatment Dr. Murati recommended.

Dr. Murati ordered a nerve conduction study and CT scan. Dr. Murati concluded claimant has radiculopathy, based on EMG results, and referred claimant to Dr. Paul S. Stein to see if she was surgical candidate. Dr. Stein found no clear indication of radiculopathy and did not recommend surgery.

Dr. Murati last saw claimant October 8, 1998. His final diagnosis was chronic lumbosacral strain with numbness bilaterally, L5 radiculopathy, resolving SI joint dysfunction bilaterally, and mild bulge of the annulus at L4-5. Based on an FCE, Dr. Murati recommended claimant limit lifting floor-to-waist to 25 pounds occasionally, 13 pounds frequently, and 5 pounds constantly. He rated the impairment at 17 percent of the whole person using the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised).

5. Dr. Peter V. Bieri performed an independent medical examination at the request of the ALJ. Dr. Bieri saw claimant on September 16, 1998. He diagnosed chronic lumbar strain with radiographic findings consistent with minimal joint disease at L4-5. He rated the impairment as 10 percent of the whole person using the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised). He gave no impairment for radiculopathy because, although in his opinion she had symptomatology consistent with radiculopathy, it did not meet the criteria for rating under the *Guides*. Dr. Bieri recommended light-medium category of work with lifting limited to 35 pounds occasionally, 15 pounds frequently, and 5 pounds constantly.

6. Sometime shortly after the accident in January 1996, claimant began having difficulty sleeping and would cry for no apparent reason. She also felt her supervisors were harassing her. She would sometimes become hysterical at work.

7. Claimant was also seen, at the request of her counsel, by Dr. Theodore A. Moeller, a clinical psychologist. Dr. Moeller saw claimant in June 1997, February 1998, and finally in January 1999. He administered tests and conducted clinical interviews. He diagnosed a single episode of major depression, adjustment disorder, and pain disorder, all directly traceable to the injury claimant suffered at work in January 1996. The symptoms included loss of appetite, sleep disorder, obsessive focus on her problems, diminished energy, and an anxious, depressed sense. Dr. Moeller initially rated the impairment, using the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition, which he testified was the same as the Third Edition (Revised), as 25 percent of the body as a whole. Dr. Moeller later changing this to 20 percent of the whole person because claimant improved beyond what he expected.

8. Dr. Robert J. Fowler also testified. Dr. Fowler is an internist who treated claimant before the January 1996 accident. In 1997, after the current injury, he diagnosed depression and placed claimant on anti-depressant medication.

Conclusions of Law

1. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides for the Evaluation of Permanent Impairment*. K.S.A. 44-510e.
2. At the time of claimant's accident, the applicable version of the *AMA Guides* was the Third Edition (Revised). K.S.A. 1995 Supp. 44-510e.
3. Based on the testimony of Dr. Bieri, whom the court appointed to conduct an independent evaluation, the Board finds claimant's impairment due to physical injury is 10 percent impairment of the whole person. The rating by Dr. Mills is based on the Fourth Edition of the *AMA Guides*. The rating by Dr. Murati includes radiculopathy that the weight of the medical evidence indicates claimant did not have.
4. Psychological impairment is compensable under the workers compensation laws of Kansas if shown to be directly traceable to a compensable physical injury. *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 771 P.2d 557, rev. denied 245 Kan. 784 (1989); *Followill v. Emerson Electric Co.*, 234 Kan. 791, 674 P.2d 1050 (1984).
5. In cases involving both physical and psychological impairment, the disability award must be based on consideration of both. This does not mean that, in all cases, the two should be added. It may be proper to add the physical and psychological impairments but this depends on how each impairment affects the other. *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994).
6. Claimant's total impairment is 20 percent of the whole person. The Board has not simply added the rating by Dr. Moeller to the physical impairment of 10 percent. The Board concludes the rating by Dr. Moeller is not well supported by his findings. As the cross examination of Dr. Moeller indicated, many of the symptoms that act as criteria for Dr. Moeller's three diagnoses have essentially disappeared. This fact may, however, be explained in part by the medication for depression, and the Board believes the evidence does establish claimant has a level of additional impairment from the mental condition traceable to the physical injury.
7. The medical care provided by Dr. Murati should not be treated as unauthorized. K.S.A. 44-510(c) provides that in cases where the medical care provider is not satisfactory, the director may authorize appointment of some other health care provider. In such a case, the employer is to provide the names of three health care providers and the employee is permitted to choose one from that list. The Board has held these provisions for change of physician apply only to cases where the respondent is providing active treatment and the claimant asks that the treatment be changed. In this case, Dr. Mills concluded there was

nothing more he could provide and released claimant. Although he advised claimant could return as needed, it is clear he did not consider additional treatment necessary. The ALJ found respondent was, in effect, not providing treatment at the time claimant asked that Dr. Murati be authorized. Dr. Mills was provided pursuant to order by the ALJ. Under these circumstances, the Board agrees with the analysis by the ALJ. Respondent was not providing treatment, and the statute for change of physicians does not apply. The medical expenses for treatment by Dr. Murati are authorized expenses.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes on October 4, 1999, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Phyllis Brown, and against the respondent, Elec-Tron, Inc., and its insurance carrier, United States Fire Insurance Company, for an accidental injury which occurred January 23, 1996, and based upon an average weekly wage of \$232.56, for 19.14 weeks of temporary total disability compensation at the rate of \$155.05 per week or \$2,967.66, followed by 82.17 weeks at the rate of \$155.05 per week or \$12,740.46, for a 20% permanent partial disability, making a total award of \$15,708.12, all of which is presently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary A. Winfrey, Wichita, KS
Douglas C. Hobbs, Wichita, KS

Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director